No. 794

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO (a National Banking Association),

APPELLANT,

VS.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, et al.,

APPELLEES.

APPELLEES' BRIEF.

FRANKLIN K LANE,
City Attorney,
Solicitor for Appellees.

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Appellant,

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, and JOSEPH H. SCOTT, AS TAX COLLECTOR OF SAID CITY AND COUNTY,

Appellees.

Appellees' Points and Authorities.

Between the first Mondays in March and July, 1900, the Assessor of the City and County of San Francisco proceeded to and did assess, for purposes of taxation, the shares of stock of all national banks having their principal place of business in said City and County. This assessment was made under and in virtue of the provisions of an Act of the Legislature of the State of California, in ef-

fect March 14, 1899, amending section 3608 of the Political Code of that State, and adding sections 3609 and 3610 thereto, all relating to property liable to taxation for purposes of revenue. The purpose of this act is served when an assessment and taxation of National Bank shares is secured at a rate not greater "than is made or assessed "upon other moneyed capital in the hands of individual "citizens of this State."

A review of the legislative and judicial history of the attempts of the State of California to subject the shares of stock of national banks, having their principal places of business in this State, to assessment and taxation, would be full of legal interest. Up to the passage of the Act of 1899, these attempts have been uniformly unsuccessful. It is believed that, in that Act, the State has complied with all the limitations imposed by the Congress, and has honestly and fairly provided a system through which justice will be done the banks and the banks will be required to do justice to the State and her taxpayers. It is upon the validity of this Act, tried in the crucival of Federal and State limitation, that this appeal must come to depend. And upon that test rests the right of a Sovereign State to subject to their just share of the burdens of her Government, the wealth within her limits invested in national bank stock. Congress has recognized the justice of requiring such property to bear its proper proportion of such burden, not alone that the Government of the State may be thereby sustained, but equally that no Federal agency shall

be introduced into the commercial life of a State, free from the obligations which are imposed by the necessity of sustaining that Government upon her own banks and bankers. While it is important that no national bank should be the object of unjust discrimination at the instance of the State, it is equally essential that no State bank should be so subjected.

"All that has ever been held to be necessary is, that the "system of State taxation of its own citizens, of its own "banks, and of its own corporations shall not make a dis- "crimination unfavorable to the holders of the shares of "national banks. Nor does the Act of Congress require "anything more than this; neither its language nor its "purpose can be construed to go any further. Within "these limits the manner of assessing and collecting all "taxes by the States is uncontrolled by the Act of Con- "gress."

Davenport Bank vs. *Davenport*, 123 U. S., 84.
Mercantile Bank vs. *New York*, 121 U. S., 138.

In so much as the exemption of one class of property must increase the burden to be borne by that which remains to be taxed, is it unjust to all other classes of property that any should be allowed to escape taxation. Every intendment, therefore, should be indulged in support of a law which bears upon its face evidence of a sincere desire to avoid discrimination, and to deal fairly with the national banks and their shareholders. While the right of

every citizen to resist an unjust or excessive tax must be cheerfully conceded, the practical workings of an intricate system of taxation do not admit of that nicety of adjustment which will relieve all individual hardship or produce absolute uniformity of assessment.

"The most that can be expected from wise legislation is "an approximation to the desirable end, and the require- "ment of equality and uniformity found in the Constitu- "tions of some of the States is complied with, when de- "signed and manifest departures from the rule are "avoided."

Stanley vs. *Supervisors*, 121 U. S., 550.

The determination of the questions here involved invites a high and broad minded view of the issues presented commensurate with the dignity and importance of the subjects to which they relate.

I.

Constitutionality of the Act of March 14, 1899.

We pass to a consideration of the constitutionality of the Act of March 14, 1899, wherein serious questions press for determination. What solicitor for appellant has said, in definition of the power of the State to exercise the power of taxation, may be conceded. Whether the State possesses an inherent power, as a necessary attribute of her sovereignty, to tax all property within her limits, irrespec-

tive of the uses to which it may be put, until such power is restricted or limited by express Act of Congress, is immaterial in this inquiry. Whether Section 5219 of the Revised Statutes be considered a limitation upon the taxing power of the State, or a grant to the State, of power to tax the shares of national banks, the all important fact remains that the power to tax the shares of stock of national banks was conceded to the States by Act of Congress in Section 5219 of the Revised Statutes.

By that section the power is confirmed in the State to "include in the valuation of the personal property of the "owner or holder of such shares" all shares in any national banking association; and it is expressly declared:

"But the Legislature of each State may determine and "direct the manner and place of taxing all the shares of "national banking associations located within the State, "subject only to the restrictions that the taxation shall "not be a greater rate than is assessed upon other mon-"eyed capital in the hands of individual citizens of such "States, and that the shares of any national banking as-"sociation owned by non-residents of any State shall be "taxed in the city or town where the bank is located, and "not elsewhere."

Subject to the two restrictions noted, the power of the State to tax the shares of capital stock of national banks is as great as its power to tax any other species of property found within the taxing jurisdiction, and such power is unlimited.

" Unless restrained by provisions of the Federal Consti-
" tution, the power of the State as to the mode, form and
" extent of taxation is unlimited, where the subjects to
" which it applies are within the jurisdiction."

State Tax on Foreign Held Bonds, 15 Wall., 334.
Kirtland vs. *Hotchkiss*, 100 U. S., 491.
Mackay vs. *S. F.*, 113 Cal., 392.

And the Act of Congress recognizes this rule by declaring, "that the Legislature of each State may direct and de-
" termine the manner and place of taxing all the shares of
" national banking associations located within the State."

Uniformity of Assessment.

We find, that, in consequence of this power in the State, the questions presented most frequently for determination in connection with its exercise concern the force and effect of the two restrictions imposed by Congress; and, as the requirement, that the shares of non-residents shall be taxed at the locality in which the bank is situated, is unambiguous and easily complied with, the great volume of litigation has to do with the interpretation of the first restriction: "that the taxation shall not be at a greater rate
" than is assessed upon other moneyed capital in the hands
" of individual citizens of such State."

At the outset it may be conceded that the requirement that taxation shall not be "at a greater rate" means that

the assessment, as well as the amount levied in proportion to the assessment, shall not be at a greater rate.

And by that concession we do not desire to be understood as conceding that each individual variation, between assessment of national bank shares and other taxable property, would constitute a ground for successful assault upon the assessment. Individual variations are unavoidably incident to every system of taxation, are so recognized by the Courts, and are condoned accordingly. It is only under a state of facts which discloses a preconcerted understanding on the part of the Assessor, or as a result of operations of the State statute, to discriminate against the shares of national banks, that the courts will declare an assessment void on that ground.

As the Supreme Court says, in *Stanley* vs. *Supervisors*, 121 U. S., 550:

"Absolute equality and uniformity are seldom, if ever, " attainable, the diversity of human judgments, and the " uncertainty attending the human evidence, preclude the " possibility of this attainment. Intelligent men differ as " to the value of most common things before them—of ani- " mals, houses and lands in constant use. The most that " can be expected from wise legislation is an approxima- " tion to the desirable end; and the requirement of equality " and uniformity found in the Constitutions of some of the " States is complied with, when designed and manifest de- " partures from the rule are avoided."

And it is accordingly the rule that Courts will not interfere with an assessment of property at its full value, on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers, whose acts of under-valuation create the discrimination, intentionally and habitually violate the law by assessing property at less than its true value.

Bank vs. *Kimball*, 103 U. S., 722.
Supervisors vs. *Stanley*, 105 U. S., 305.
Bank vs. *Perea*, 147 U. S., 67.

"Other Moneyed Capital."

There is another settled construction upon which it may be possible to agree. The term "other moneyed capital," as used in this section, has received what may be considered a settled interpretation, in the light of which the consideration of this case should proceed.

In the very recent case of *National Bank* vs. *Mayor, etc., of Baltimore*, 100 Fed., 29, the Circuit Court of Appeals for the fourth Circuit says:

"The words 'moneyed capital' not having been defined by "the statute, it has been left to the courts to interpret "them, and they have been so frequently considered by "the Supreme Court of the United States that there is little "difficulty in ascertaining what that Court construes them "to mean. The leading case is *Mercantile Nat. Bank* vs. "*City of New York*, 121 U. S., 157, and the last case is *First*

"*National Bank of Aberdeen* vs. *Chehalis Co.*, 166 U. S., "440. In these two will be found a review of nearly all "the decisions. It would serve no good purpose to restate "them. The result of them all is that 'moneyed capital' "has been given a restricted meaning. It is the nature of "the employment that fixes its character. * * *

"The policy and purpose of Congress was to protect the "instrumentalities created by it from unfair competition, "by requiring that all persons engaged in like business "should pay upon the capital so employed a like and equal "rate of taxation. *The true test* is the nature of the busi- "ness in which the person is engaged, and that cannot be "determined by the character of the investment. Moneyed "capital does not mean all capital the value of which is "measured in terms of money."

In short, only competing "moneyed capital" is required to be assessed at no greater rate than shares of stock of national banks.

Mercantile Bank vs. *New York*, 121 U. S., 154-7.
Evansville Bank vs. *Britton*, 105 U. S., 322.
National Bank vs. *Chehalis*, 166 U. S., 440.

The questions are so far narrowed, therefore, as to be confined to the inquiry whether the revenue laws of California, as found in its Constitution and statutes, including the Act of March 14, 1899, assume to impose a greater rate

of taxation upon the shares of national banks than they impose upon other competing "moneyed capital."

We say this is the scope of the inquiry on this part of the case, for the reason that it is not alleged, nor is it a fact, that appellee has intentionally or unintentionally, discriminated against such shares, or that he has discriminated at all, other than by such discrimination as, it is alleged, will result from the revenue laws of the State. On the contrary, the appellant has deducted from the properties of the banks, which are legally elements in the estimation and determination of the value of its shares, the United States bonds held by such banks (Record, pp. 12 and 13), although it was early declared by the United States Supreme Court that it was competent to include such bonds, in the estimation of the value of the shares.

Van Allen vs. *Assessors,* 3 Wall., 573.
Bradley vs. *People,* 4 Wall., 459.
People vs. *Commissioners,* 4 Wall., 244.

Statement of the Concrete Question.

We reiterate, therefore, the question is, on this branch of the case, whether the Constitution and laws of the State of California do, on their face, discriminate against national bank shares, in their assessment and the assessment of other competitive moneyed capital.

And at the opening of this inquiry, the syllabus of the Supreme Court of the United States, in *Davenport Bank* vs. *Davenport,* 123 U. S., 83, may be quoted with profit:

"Section 5219 Revised Statutes, respecting the taxation "of national banks, does not require perfect equality be- "tween State and national banks, but only that the system "of taxation in a State shall not work a discrimination "favorable to its own citizens and corporations, and un- "favorable to the holders of shares of national banks. If "a State statute creating a system of taxation does not, on "its face, discriminate against national banks, and there "is neither evidence of legislative intent to make such dis- "crimination, nor proof that the statute works an actual "and material discrimination, there is no case for holding "it to be unconstitutional."

It will hardly be contended that this Act of 1899 discloses on its face any hostile legislative intent, so far as permitting such deductions from national bank stock as are permitted to other moneyed capital.

On the contrary, in the enactment of the Act of March 14, 1899, the Legislature of the State repeatedly emphasized its intent that no discrimination should be made against the holders of national bank shares. Thus it is provided in the Act (Sec. 3609):

"And the assessment and taxation of such shares of "stock in said national banking associations shall not be at "a greater rate than is made or assessed upon other "moneyed capital in the hands of individual citizens of "this State."

And again, in the same section, it is provided: "and said

"shares shall be valued and assessed as is other property " for taxation."

The only discrimination on the face of the statute, if that be a discrimination, is in the exemption of shares of stock of other corporations from assessment.

With this in mind we pass to a consideration of the revenue system of California, with particular reference to the validity of the Act of March 14, 1899.

The statute it attacked on several grounds, the *first*, and perhaps the most important of which, is, that no deduction can lawfully be allowed to the owners of national bank stock for unsecured debts owing by them to *bona fide* residents, while such a deduction is permitted and required to be made from solvent credits unsecured; and *second*, that no assessment of the shares of national bank stock can be made while the State law (Section 3608 Pol. Code) exempts, *co nomine*, shares of stock in certain other corporations from assessment and taxation.

We will discuss these questions in their order.

A.

Is a Deduction Allowed to the Owners of National Bank Stock from the Value of their Stock of Debts Owing by them to Bona Fide Residents of the State?

This contention, as insisted upon by appellant, involves the validity of that portion of the Act of 1899, which provides for such deduction. Section 3609, Political Code, as found in that Act, provides:

"But in the assessment of such shares, each stock-
holder shall be allowed all the deductions permitted by
"law to the holders of moneyed capital in the form of
"solvent credits, in the same manner as such deductions
"are allowed by the provisions of paragraph six of section
"thirty-six hundred and twenty-nine of the Political Code
"of the State of California. * * * And the assess-
"ment and taxation of such shares of stock in said national
"banking association shall not be at a greater rate than
"is made or assessed upon other moneyed capital in the
"hands of individual citizens of this State."

The attitude of appellant is, not that the Act has failed to make provision for the deduction which it claims, and which the Assessor alleges he is prepared to grant, but that the clause of the statute permitting such deduction is unconstitutional and void.

Section 1, Article XIII, Const. of Cal.

In the first place, the provision which is attacked as being void is obviously designed for the benefit of complainant's stockholders, and is in conformity with appellant's construction of the Act of Congress requiring that such shares shall not be assessed at a greater rate than is assessed upon other moneyed capital. The Act of the Legislature gives it such right, but it complains that it has been given it by the statute, and not by the Constitution. Can it be heard to complain because a right is accorded him of which he will be permitted to take advantage, and

which brings this portion of the statute unquestionably within the provisions of the only Act which affords him protection? What beneficial interest has complainant in avoiding a portion of a statute which was designed for its benefit?

And even if this Act of 1899 had contained no such provision, would it result therefrom that it would be void?

This question was answered by the Supreme Court of the United States in *Supervisors* vs. *Stanley*, 105 U. S., 305-311, as follows:

"Accepting, therefore, as we must, the Act of 1866, as "construed by the Court of Appeals of New York, as not "authorizing any deduction for debts by a stockholder of "a national bank, is it, for that reason, void? This cannot "be true in its full sense, for there is no reason why it "should not remain the law as to banks or banking asso- "ciations organized under the laws of the State, or as to "private bankers, of which there no doubt exists a large "number of both classes.

"What is there to render it void as to a stockholder in a "national bank, who owes no debts which he can deduct "from the assessed value of his shares? The denial of this "right does not affect him. He pays the same amount of "tax that he would if the law gave him the right of deduc- "tion. He would be in no better condition if the law ex- "pressly authorized him to make the deduction. What "legal interest has he in a question which only affects "others? Why should he invoke the protection of an Act

" of Congress in a case where he has no right to protect?
" Is a Court to sit and decide abstract questions of law in
" which the parties before it show no interest, and which, if
" decided either way, affect no right of theirs?

" It would seem that if the Act remains a valid rule of
" assessment for shares of State banks and for individual
" bankers, it should also remain the rule for shareholders
" of national banks who have no debts to deduct, and who
" could not, therefore, deduct anything if the statute con-
" formed to the requirements of the Act of Congress."

And again, in the same case, after reviewing a number of authorities, the Court says (page 315) :

" It follows that the Assessors were not without author-
" ity to assess national bank shares; that where no debts
" of the owners existed to be deducted the assessment was
" valid, and the tax paid under it a valid tax. That in
" cases where there did exist such indebtedness, which
" ought to be deducted, the assessment was *voidable* but not
" void. The assessing officers acted within their authority
" in such cases until they were notified in some proper man-
" ner that the shareholder owed just debts which he was
" entitled to have deducted."

This case has been affirmed in *Palmer* vs. *McMahon,* 133 U. S., 667.

If, therefore, appellant can be heard to complain of a provision in the law favorable to its shareholders, and of

which the appellee alleges his intention of giving it the full benefit, and its contention that this beneficial provision of the statute is void in so far as it denies such deduction, where the shareholders are entitled to it, is sustained, it by no means follows that the Assessor is without power to make such assessment, or that the assessment, when made, would be anything more than voidable; on the contrary, it would not be either void or voidable until a showing was made and sustained that the shareholders were indebted, in unsecured debts, to *bona fide* residents of the State.

Such an assessment, made in the presence of a showing that the stockholder was so indebted, and had complied with the provisions of the law entitling him to such deduction, would disclose a voidable assessment as to such stockholder. But, as to all other stockholders who fail to avail themselves of the deduction, the assessment would be perfectly good.

But that would indeed be a peculiar principle, which would permit a complainant to enter a Court of equity for the purpose of claiming the protection of the Act of Congress, and under cover of such pretense to permit it to attack the features of a State law designed for its benefit, and in conformity with that Act.

The right, however, to enjoy that deduction from solvent credits of debts due to *bona fide* residents is not without its conditions. The Constitution of California has not conferred that right, but has simply provided:

"The Legislature *may* provide, except in the case of

"credits secured by mortgage or trust deed, for a deduc-
"tion from credits of debts due to *bona fide* residents of
"this State."

Section 1, Article XIII, California Constitution.

This section is not self-executing, and it remained for the Legislature to make provision for such a reduction before it was available to the taxpayer. This provision was made in virtue of the provisions of Section 3629, Subdivision 6, of the Political Code. In defining what property shall be separately stated in the statement of the taxpayer, it is provided therein, with respect to solvent credits:

"6. All solvent credits, unsecured by deed of trust,
"mortgage, or other lien on real or personal property, due
"or owing by such person, or any firm of which he is a
"member, or due or owing to any corporation of which he
"is president, secretary, cashier, or managing agent, de-
"ducting from the sum total of such credits such debts
"only, unsecured by trust deed, mortgage, or other lien on
"real or personal property, as may be owing by such per-
"son, firm or corporation, to *bona fide* residents of this
"State. *No debt shall be deducted unless the statement*
"*shows the amount of such debt as stated under oath in*
"*aggregate; provided, in case of banks the statement is not*
"*required to show the debt in detail, or to whom it is*
"*owing;* but the Assessor shall have the privilege of ex-
"amining the books of such banks to verify said state-
"ment."

Appellant would be entitled to a deduction, on account of debts due *bona fide* residents of California, from the value of its stock in any event, *only* after the condition here expressed in the statute granting such right to all taxpayers had been complied with. No debt shall be so deducted unless the bank shall return, in its statement of property, the amount of debts due to such *bona fide* residents. Such debts need not be stated in detail, but a statement of the amount for the deduction of which the claim is asserted, must be made.

There is no showing here that any such statement has been made; that any such deduction has been demanded, or that any such indebtedness exists. On the contrary, appellees allege (Record, pp. 40, 41, 42) that no such statement was made or returned in accordance with Section 3629 of the Political Code, or otherwise.

This brings appellant's case clearly within the rule laid down by the Supreme Court that, where a condition is imposed on the enjoyment of a right, such condition must be complied with before the right can be enforced.

Conceding, however, for the present, that that portion of the Act of March 14, 1899, which provides for the deduction from national bank stock of unsecured debts due *bona fide* residents, is in conflict with Section 1, Article XIII, of the Constitution of the State, it by no means follows that the act is not enforceable; or that an assessment made in conformity with its remaining provisions would discriminate against the owners of national bank shares; or that such

shares would be assessed at a greater rate than is or will be assessed upon the moneyed capital in competition therewith.

B.

An Assessment of the Shares is an Assessment of the Net Assets of the Corporation.

If, in the assessment of shares of stock, the value of such shares represents the difference between the gross assets of the bank and its liabilities, other than secured credits, it follows that such an assessment is the equivalent of an assessment of the assets of the banks minus its unsecured liabilities. If this be so, the method of assessment, required by Act of Congress, has been followed, by an assessment of the shares of stock without permitting a deductiion from such shares of unsecured debts. To allow such deduction to the shareholder would be to allow a double deduction from such credits—once for the unsecured debts of the bank, and second for the unsecured debts of the shareholders. This is manifestly not required by the Act of Congress, the requirements of which are met when an equal deduction is made, and which does not require that there should be any discrimination *in favor* of national bank shares.

A contention almost identical with the one now under discussion reached the Supreme Court of the United States in *National Bank of Wellington* vs. *Chapman*, 173 U. S., 211, a case in which the revenue laws of Ohio allowed a de-

duction of debts from credits, but denied it to the holders of shares of stock. The position is stated thus in the opinion:

"The complaint is founded upon the allegation that the "owners of what is termed credits in the law of Ohio "(Rev. Stats., par. 2730) are permitted to deduct certain "kinds of their debts from the total amount of their "credits, and such owners are assessed upon the balance "only, while no such right is given to owners of shares in "national banks. The claim is that shares in national "banks should be treated the same as credits, and their "owners permitted to deduct their debts from the valua- "tion. The owners of property other than credits are not "permitted to deduct their debts from the valuation of "that property" (p. 213).

This would appear to be a case almost identical in fact and principle with the case at bar.

The Court said (p. 215):

"Under the Ohio law the shares in national and also in "State banks are what is termed stocks or investments in "stocks, and are not credits from which debts can be de- "ducted. As between the holders of shares in incorpor- "ated State banks and national banks on the one hand, and "unincorporated banks or bankers on the other, we find "no evidence of discrimination in favor of unincorporated "banks or bankers. In regard to this latter class, there is

"no capital stock, so-called, and Section 2759 of the Re-
"vised Statutes therefore makes provision, in order to de-
"termine the amount to be assessed for taxation, for de-
"ducting the debts existing in the business itself from the
"amount of moneyed capital belonging to the bank or
"banker and employed in the business, and the remainder
"is entered on the tax book in the name of the bank or
"banker, and taxes assessed thereon. This does not
"give the unincorporated bank or banker the right to de-
"duct his general debts disconnected from the business of
"banking, and not incurred therein, from the remainder
"above mentioned. It cannot be doubted that under this
"section those debts which are disconnected from the bank-
"ing business cannot be deducted from the aggregate
"amount of the capital employed therein. The debts that
"are incurred in the actual conduct of the business are de-
"ducted so that the real value of the capital that is em-
"ployed may be determined and the taxes assessed thereon.

"This system is, as nearly as may be, equivalent in its
"results to that employed in the case of incorporated State
"banks. Under the sections of the Revised Statutes which
"relate to the taxation of these latter classes of banks
"(Sec. 2762, etc.), the shares are to be listed by the auditor
"at their true value in money, *which necessarily demands*
"*the deduction of the debts of the bank, because the true*
"*value of the shares in money is necessarily reduced by an*
"*amount corresponding to the amount of such debts.* In
"order to arrive at their true value in money the bank re-

"turns to the auditor the amount of its liabilities as well "as its resources. Thus in both incorporated or unincor- "porated banks the same thing is desired, and the same re- "sult of assessing the value of the capital employed in the "business, after the deduction of debts incurred in its con- "duct, is arrived at in each case as nearly as is possible, "considering the difference in manner in which the "moneyed capital is represented in unincorporated banks "as compared with incorporated banks which have a capi- "tal stock divided into shares. That mathematical equal- "ity is not arrived at in the process is immaterial. It can "not be reached in any system of taxation, and it is use- "less and idle to atempt it. Equality, as far as the differ- "ing facts will permit, and as near as they will permit, is "all that can be aimed at or reached. That measure of "equality, we think, is reched under this system. So far "as this point is concerned, it is entirely plain that there "is no discrimination between unincorporated banks and "bankers on the one hand and the holders of shares of "stock in national banks on the other."

In this connection, we quote from *Bressler* vs. *Wayne Co.*, 32 Neb., 834.

This case involved the right of a holder of national bank shares to deduct his *bona fide* debts in listing his shares for taxation.

In the opinion the leading cases of the United States Supreme Court, on the questions of deductions and exemp-

tions, are considered and the former doctrine of the State Court overruled.

"The fact that the unincorporated bank is entitled to "such deduction is no valid reason why the debts of the "owner of national bank stock should be deducted from "the value of his shares in assessing them. National "banks are assessed solely by taxing the shares of stock. "In unincorporated banks there are no shares of stock to "tax, and the Legislature, of necessity, was compelled to "adopt a different method of taxing them by assessing the "value of the capital therein invested, which is practical- "ly the difference between the value of the assets and the "amount of liabilities. *The shares of a national bank do "not represent the assets of the bank, but rather the differ- "ence between the value of its property and its liabilities.* "While the method of assessing national banks is different "from that by which a private bank or banker is assessed, "the rule of uniformity is preserved, so that it cannot be "said that the law of the State requires that national banks "shall be taxed at a greater rate than is imposed upon "the capital invested in the State banks."

In *Chapman* vs. *Bank of Wellington*, 56 Ohio, 310, affirmed in *National Bank of Wellington* vs. *Chapman*, 173 U. S., 205, the Court, in considering Section 2762, Revised Statutes of Ohio, providing that shares of stockholders in incorporated banks, whether State or national, shall be "listed at their true value in money" (p. 328), holds that,

in fixing the true value of the shares in money, the bank deducts its debts from its credits, so that it pays taxes only on its net valuation. Unincorporated banks are taxed in the same manner by deducting debts from credits, so as to pay only on the net capital stock. By Section 2759 of the laws of Ohio, in the case of incorporated State banks, after the deduction of debts from credits is made, and the net value of each share of stock thus ascertained, the holder of such stock is compelled to pay taxes upon such value, and is not permitted to deduct his legal *bona fide* debts therefrom. In the case of the unincorporated banks, when the net value of the capital is ascertained, the bank pays the tax thereon, and the several owners of the capital are not allowed to deduct any of their individual debts from their shares of such capital. It is thus clear that moneyed capital invested in national banks is placed upon an exact equality with moneyed capital invested in State banks, and this is all that can be reasonably asked for national banks.

"To place the holder of national bank shares into the "class of bankers, and treat his shares as stocks until the "net value is fixed, and then change his stock into credits "and take him out of the class of bankers and place him "into the class of private individuals, so as to enable him "still further to reduce his stock thus changed into a "credit, by deducting therefrom his legal *bona fide* debts, "would be discriminating in favor of such national bank "shareholder, and would be giving him two chances to es-

"cape taxation while other bankers and private individ-
"uals have but one.

"We think that national bank shares belong to the class
"known as stocks, and not to the class known as credits,
"and that such shares cannot have the double advantage
"of both stock and credits; and that the holders of such
"shares have no right under the statutes, State, and na-
"tional, to deduct their legal *bona fide* debts from the as-
"sessment value of such shares."

And in *Van Allen* vs. *Assessor*, 3 Wall., *supra*, where it is held that national bank shares are taxable in the hands of the owner, regardless of the fact that part or whole of the capital of the bank is exempt from taxation, the Court, in considering the relation of the shares of stock to the property possessed by the bank, says:

"The corporation is the legal owner of all the property
"of the bank, real and personal; and within the powers
"conferred upon it by charter and for the purposes for
"which it is created, can deal with the corporate property
"as absolutely as a private individual can deal with his
"own. * * * The interest of the shareholder entitles
"him to participate in the net profits earned by the bank in
"the employment of its capital, during the existence of its
"charter, in proportion to the number of his shares; and
"upon its dissolution or termination, to his proportion of
"the property that may remain after the payment of its
"debts."

in fixing the true value of the shares in money, the bank deducts its debts from its credits, so that it pays taxes only on its net valuation. Unincorporated banks are taxed in the same manner by deducting debts from credits, so as to pay only on the net capital stock. By Section 2759 of the laws of Ohio, in the case of incorporated State banks, after the deduction of debts from credits is made, and the net value of each share of stock thus ascertained, the holder of such stock is compelled to pay taxes upon such value, and is not permitted to deduct his legal *bona fide* debts therefrom. In the case of the unincorporated banks, when the net value of the capital is ascertained, the bank pays the tax thereon, and the several owners of the capital are not allowed to deduct any of their individual debts from their shares of such capital. It is thus clear that moneyed capital invested in national banks is placed upon an exact equality with moneyed capital invested in State banks, and this is all that can be reasonably asked for national banks.

"To place the holder of national bank shares into the "class of bankers, and treat his shares as stocks until the "net value is fixed, and then change his stock into credits "and take him out of the class of bankers and place him "into the class of private individuals, so as to enable him "still further to reduce his stock thus changed into a "credit, by deducting therefrom his legal *bona fide* debts, "would be discriminating in favor of such national bank "shareholder, and would be giving him two chances to es-

"cape taxation while other bankers and private individ-
"uals have but one.

"We think that national bank shares belong to the class
"known as stocks, and not to the class known as credits,
"and that such shares cannot have the double advantage
"of both stock and credits; and that the holders of such
"shares have no right under the statutes, State, and na-
"tional, to deduct their legal *bona fide* debts from the as-
"sessment value of such shares."

And in *Van Allen* vs. *Assessor*, 3 Wall., *supra*, where it is held that national bank shares are taxable in the hands of the owner, regardless of the fact that part or whole of the capital of the bank is exempt from taxation, the Court, in considering the relation of the shares of stock to the property possessed by the bank, says:

"The corporation is the legal owner of all the property
"of the bank, real and personal; and within the powers
"conferred upon it by charter and for the purposes for
"which it is created, can deal with the corporate property
"as absolutely as a private individual can deal with his
"own. * * * The interest of the shareholder entitles
"him to participate in the net profits earned by the bank in
"the employment of its capital, during the existence of its
"charter, in proportion to the number of his shares; and
"upon its dissolution or termination, to his proportion of
"the property that may remain after the payment of its
"debts."

The general rule is that a share of stock is a right to a proportionate part in the dividends and profits of the corporation and to a share of its net assets upon dissolution. That the shareholder is entitled to a part only of the net assets, or assets remaining after the payment of debts, is supported by these cases:

Plumpton vs. *Bigelow*, 93 N. Y., 599.
Field vs. *Pierce*, 102 Mass., 261.
Jones vs. *Davis*, 35 Ohio, 477.
Tax Collector vs. *Insurance Co.*, 42 La. An., 1172.
Farrington vs. *Tennessee*, 95 U. S., 687.
People vs. *Bank of D. O. Mills*, 123 Cal., 60.

C.

No Solvent Credits Escape Assessment Under the Constitution and Laws of the State of California.

It is the declaration of Section 1, Article XIII, of the Constitution of this State that:

"All property in the State not exempt under the laws of "the United States shall be taxed in proportion to its value "to be ascertained as provided by law. The word 'prop- "erty,' as used in this article and section, is hereby de- "clared to include moneys, *credits*, *stocks*, dues, *franchises*, "and all other matters and things, real, personal and "mixed, capable of private ownership.* * * The "Legislature may provide, except in case of credits secured

"by mortgage or trust deed, for a deduction from credits "of debts due to *bona fide* residents of this State."

Sec. 3607, Pol. Code.

And Section 3617, Political Code, defines credits as follows:

"The term 'credits' means those solvent debts not se- "cured by mortgage or trust deed, owing to the person, "firm, corporation, or association *assessed*. The term "'debts' means those unsecured liabilities owing by the "person, firm, corporation or association *assessed to bona "fide residents of this State*, or firms, associations, or cor- "porations doing business therein; but credits, claims, "debts and demands due, owing or accruing for or on ac- "count of money deposited with savings and loan corpora- "tions shall, for the purpose of taxation be deemed and "treated as an interest in the property of such corpora- "tions, and shall not be assessed to the creditor or owner "thereof."

It is to be noted, therefore, that the permission to deduct unsecured debts from solvent credits unsecured does not relieve any portion of the wealth of the State from taxation, but simply contemplates the assessment and taxation of such debts so deducted in the hands of and as so much property belonging to the creditor. *All credits are assessed.*

This plan of taxation finds its basis in the opinion of the

Supreme Court of the United States in State Tax on Foreign Held Bonds, 15 Wall., 324, where it is said:

"But debts owing by corporations, like debts owing by "individuals, are not property of the debtors in any sense; "they are obligations of the debtors, and only possess value "in the hands of creditors. With them they are property, "and in their hands they may be taxed. To call debts "property of the debtors is simply to misuse terms. All "the property there can be in the nature of things in debts "of corporations belongs to the creditors to whom they are "payable, and follow their domicile, wherever they may "be.'"

And it is to be further noted that not all unsecured debts are deductible from the solvent credits, unsecured, of the debtor. *Only such unsecured debts can be deducted as are owing to bona fide residents of the State.* Such debts owing abroad are not deductible, because they are not subject to the taxing jurisdiction of California in the hands of the creditor.

The Supreme Court of the State, in *People* vs. *Hibernia Bank*, 51 Cal., 247, adopted an interpretation of the taxing system of the State, in which it was held that the taxation of credits and of the other property of the State must result in double taxation. The Court says:

"It may not be possible in every case to show that the "debtor has paid the tax assessed to the creditor. But it "admits of mathematical demonstration—if other prop-

"erty in the State has been assessed at its value—that the "money which shall ultimately satisfy the debt (if it is "ever satisfied) has paid the tax. If it were possible to as- "sess all the property in the State at the same moment of "time, it would be clear to every mind that an assessment "of a credit was an attempt to transfer to it value else- "where assessed. * * * But if the debtor is found to "be the owner of one thousand dollars, and is assessed for "that sum, and his creditor is found to be the owner of his "note for one thousand dollars, and is assessed for a like "sum; and if, the day after the visit of the Asessor to the "creditor, the debtor shall pay his note, it is clear that the "same value has been twice taxed," etc.

For the purpose of conforming the revenue system of the State to the reasoning of this decision, a constitutional convention was called in which provision was made for the assessment of credits, after the deduction from their value of the liabilities assessable to the creditors.

It follows, therefore, that no moneyed capital in the form of credits escapes taxation under the tax laws of this State.

The debts, though deducted, are assessed to the creditors —in whose hands only are they property, and as such taxable.

While, therefore, a deduction is so allowed, it is a deduction of such unsecured debts only as are assessable or assessed to *bona fide* residents of the State.

Those liabilities which are debts of the debtor are also

credits of the creditor, and it is the contemplation and purpose of the law that such liabilities shall be assessed and taxed in the hands of owners thereof.

Under our theory of taxation, as considered and defined in *People* vs. *Hibernia Bank*, 51 Cal., 243, and accepted by constitutional amendment, the debtor pays the tax. If this doctrine is sound, it follows that, while such deduction is permitted, the tax nevertheless falls upon the debtor.

The conclusion on this branch of the question must be that the holders of national bank stock are not entitled to deduction from the valuation of their stock of unsecured debts due to *bona fide* residents.

D.

Does the Exemption of Shares of State Banks Discriminate Against National Banks?

It is the further contention of appellant that the Act of March 14, 1899, imposes a greater rate of taxation upon the shares of national banks than is imposed upon other moneyed capital, in this: that the shares of stock in corporations organized and existing under the laws of the State, and having their corporate property therein, are exempt from taxation *co nomine*.

Before entering upon a full discussion of this contention it may not be *mal apropos* to revert to the rule of law governing the interpretation of State statutes, under which the Federal Courts are held to the interpretation placed upon such statutes by the State Court. No citation of au-

thorities is necessary to support the rule, which is also cited and relied upon by appellant.

As hereinbefore quoted, Section 1, Article XIII, of the Constitution, requires the taxation of *all* property in the State, and defines the term "property" to include "stocks."

The question was early called to the attention of the State Supreme Court, whether, under this section, it was possible to tax the entire corporate property of the corporation, and also its shares of stock, at their actual value, without violating the provision against *double* taxation. It was insisted that to tax the entire corporate property and also the shares, would be double taxation. This question was passed upon in *Burke* vs. *Badlam*, 57 Cal., 601, where the Court, in an opinion by Mr. Justice Ross, says:

"To assess all of the corporate property of the corporation and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustees of all the stockholders, and again separately to the individual stockholders in proportion to the number of shares held by each."

The theory upon which this holding is based, is that the assessment of the stock of a corporation to the stockholders and the asssesment of the property of the corporation to the corporation, would be an assessment of the same property twice; that the stock has no intrinsic value, over and above the value of the property of the corporation

which it stands for and represents. As we have seen already, the assessment of the stock of a corporation, at its actual value, is simply the assessment of the net assets of the corporation. The stocks, therefore, under the California system of assessment, as interpreted by her own Courts, stand for and represent the property of the corporation; and an assessment of the property is equivalent, in law, to an assessment of the stock. This view is well illustrated by the subsequent holding in *San Francisco* vs. *Fry,* 63 Cal., 470, to the effect that, where the property of a corporation was situated without the State, and could not be assessed by the State, that double taxation was not possible, and *the stock should be assessed.*

Stanford vs. *San Francisco,* 131 Cal., 34.

The decision in *Burke* vs. *Badlam, supra,* was accepted by the Legislature as a correct exposition of the laws of the State, and the principle therein established was incorporated in the laws of the State, Sec. 3608, Political Code, as follows:

"Sec. 3608. Shares of stock in corporations possess no "intrinsic value over and above the actual value of the "property of the incorporation which they stand for and "represent; and the assessment and taxation of such "shares, and also the corporate property, would be double "taxation. Therefore, all property belonging to corpora- "tions shall be assessed and taxed. But no assessment "shall be made of shares of stock in any corporation, save

"and except in national banking associations, whose prop-
"erty other than real estate is exempt from assessment by
"federal statutes."

S. V. W. W. vs. *Schottler*, 62 Cal., 115.
San Francisco vs. *Anderson*, 103 Cal., 69.
Germania Trust Co. vs. *San Francisco*, 128 Cal., 589.

That the rule so announced by the Supreme Court of California, and accepted by her Legislature, is sound, under her system of taxation, can hardly be open to question. We are aware there are numerous decisions rendered in the interpretation of other tax laws, holding that a share of stock is separate and distinct property which may be so treated for purposes of taxation, and which is not taxed in the taxation of corporate property. But the question here is not what rule would be adopted by another Court were the same questions submitted to it. The question is, what construction has been placed upon her revenue laws by the Courts of California? Is it possible, under her tax laws, so interpreted and enforced, to avoid a discrimination against national bank shareholders, by an assessment of the stock of such banks and an assessment of the property of competing corporations?

Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of a corporation is greatly in excess of the value of its prop-

erty, other than its franchise. This fact was called to the attention of the State Court, which recognezed the force of this suggestion, and held the Constitution and laws of the State require the assessment and taxation of the franchise of the corporation, and that its value, for purpose of such assessment and taxation, was properly ascertained by deducting from the market value of its stock the value of its corporate property, and assessing the remainder as franchise.

Thus: Let us assume the Bank of California possesses $5,000,000 worth of assessable property other than franchise. Its stock has an aggregate market value of $6,000,000. The assessable value of its franchise is properly ascertained by deducting $5,000,000, the value of its assessable property, other than franchise, from the value of its stock, $6,000,000, and assessing the balance, $1,000,000, as the value of its franschise.

San Jose Gas Co. vs. *January,* 57 Cal., 614.
S. V. W. W. vs. *Schottler,* 62 Cal., 100-112.
Ottawa Glass Co. vs. *McCalet,* 81 Ill., 556.
Burke vs. *Badlam,* 57 Cal., 594.

Under the California system of taxation of corporations, therefore, the full market value of the stock of such corporations is assessed, by an assessment of their entire property, including their franchise. Where such property is situated in another State, and is not subject to the taxing

jurisdiction of the State, the same end is attained by an assessment of the stock.

S. F. vs. *Fry*, 63 Cal., 470.

Two Lines of Decisions.

There is a further distinction which should be noted in a discussion of this question, and it has reference to the two general classes of legislation through which the different States have attempted the taxation of the property of national banks. It has been the mistaken policy of some States to place the burden directly upon the tangible property of the bank, and, in other States, the tax has been very properly assessed upon the shares of stock, with the property of the bank as the basis of valuation. This diversity has given rise to two lines of decisions in the Supreme Court of the United States, one of which has its culmination in *Owensboro National Bank* vs. *Owensboro*, 173 U. S., 664, and the other is represented by *Palmer* vs. *McMahon*, 133 U. S., 660; *Bank of Redemption* vs. *Boston*, 125 U. S., 60; *Davenport National Bank* vs. *Davenport*, 123 U. S., 83, and *Mercantile Bank* vs. *New York*, 121 U. S., 138. The *Owensboro* case drew into question the validity of a statute of Kentucky which imposed a *direct* tax upon the corporate property and franchise of the national bank, without regard to the shares of stock issued by it. The tax was upon the property and not upon the shares of stock. The tax was resisted upon two principal grounds: 1. That the taxes complained of were unlawful, because they were not laid

on the shares of stock in the names of the shareholders, but were actually imposed upon the property of the bank, contrary to the Act of Congress; 2. That if the taxes were not on the property of the bank, then they were imposed on its franchise or right to do business, derived from the laws of the United States.

The Act of Congress confers power upon the States, not to tax the property or franchise of a national bank, but only to tax the shares of such banks in the hands of the shareholders. Whether there is an equivalency between the taxation of the properties of a national bank and the taxation of its stock, is a question of valuation only, since it is not pretended that the assessment of the shares is in fact the assessment of the bank property. But in ascertaining the *valuation* at which the stock shall be assessed the net assets of the bank may be determined to the end that the actual value of the stock may be ascertained. That the value of the stock is dependent upon the assets of the bank, is admitted by the Act of Congress in providing for a deduction from the value of the shares, of the value of the real estate of the bank.

The *Owensboro* case was decided in this conclusion:

"The proposition then comes to this: Nothing but the "shares of stock in the hands of the shareholders of a na- "tional bank can be taxed, except the real estate of the "bank. The taxes which are here resisted are not taxes "levied upon the shares of stock in the names of the stock-

" holders, but are taxes levied on the franchise or intangi-
" ble property of the corporation. Thus, bringing the two
" conclusions together, there would seem to be no escape
"in reason from the proposition that the taxing law of the
" State of Kentucky is beyond the power conferred by the
" Act of Congress, and is therefore void for repugnancy to
" such Act."

The Act of 1899 is open to no such criticism. It follows the requirement of the Act of Congress and imposes the tax, not upon the franchise or intangible property of the bank, but upon the shares of the bank in the hands of its shareholders.

This may be considered the vital point of attack upon the law. And in the decision of this question we are concerned most with an attempt to make the position which we occupy thoroughly understood by the Court.

As has been asserted the question is *not* whether an assessment of the property of a national bank is the equivalent, in fact and law, of the assessment of the shares of stock of such bank in the hands of its shareholders. The Supreme Court of the United States, in the *Owensboro* and kindred cases, has held that it is not equivalent. So, also, has the Supreme Court of California held, in *First National Bank* vs. *San Francisco*, 129 Cal., 94, and like cases. The Act of 1899 does not assume to tax the property of national banks upon the theory that such a tax would be the equivalent of a tax upon their shares. This Act does not place a tax upon such property at all, but it does place a tax upon

the shares of stock of such banks. So that we are not here concerned with the question considered in the *Owensboro* case. We are not called upon to maintain the proposition that a tax upon the possessions of a national bank is the same as a tax upon its shares. We impose no such tax. Our tax is levied upon the shares of stock. Let this be understood.

But California does not levy a direct tax upon the shares of stock of California corporations, the property of which is assessed and taxed in California. It is on this fact that the attack is based. Not that we do not tax the shares of stock of national banks directly, but that we tax the shares of stock of California corporations indirectly. If the shares of stock of local corporations escape taxation under the California system, it may not be doubted that no tax can lawfully be levied upon shares of stock of national banks. So that the real question here is: Are the shares of stock of competing California corporations taxed under the California system?

The real question therefore is whether, under the California system, the assessment and taxation of all the property of California corporations is equivalent to the assessment and taxation of the shares of stock of California corporations. Not whether the assessment and taxation of the property of a national bank is equivalent to the assessment and taxation of its shares. Not whether the assessment and taxation of the property of a California corporation is equivalent to the assessment and taxation of the shares of

stock of a national bank. But whether the assessment and taxation of all the property of a California corporation is the equivalent of the taxation of the shares of stock of such corporation.

In short, whether the statement contained in Section 3608, that shares of stock possess no intrinsic value over and above the actual value of the property which they stand for and represent, and that the assessment and taxation of such shares, and also of the corporate property, would be double taxation, are legal lies; or whether those declarations and the holdings of the State Supreme Court in support thereof, are true under the revenue laws of California.

It certainly cannot be successfully contended that California must subject the corporate property within her taxing jurisdicton to double taxation in order to tax national bank stock but once. The question, then, is whether California has provided for a tax upon the shares of stock of her corporations; and this brings us to the question whether, *under her system as interpreted by her Courts*, the assessment and taxation of all the corporate property is equivalent to the assessment and taxation of the shares of stock of such corporations. And, as an interpretation of the revenue laws of a State by its own Courts, is binding upon a Federal Court, we are concerned here only with the views of the Supreme Court of California upon this point. It may be said, however, that the Supreme Court of that

State is not alone in the views expressed, very eminent authority is sister States having taken the same view.

Rice vs. *National Bank,* 23 Minn., 280.
Com'ers vs. *National Bank,* 48 Md., 117.
Lackawanna vs. *National Bank,* 94 Pa. St., 221.
Rosenberg vs. *Texas,* 67 Texas, 578.
Gordon vs. *Mayor, etc.,* 5 Till., 231.
Blythe vs *Brannin,* 3 Zabr., 484.
Johnson vs. *Commonwealth,* 7 Dana., 342.
Tax Cases, 12 G. & Johns., 117.
Smith vs. *Burley,* 9 N. H., 423.
Williams vs. *Weaver,* 75 N. Y., 31.
New Haven vs. *Bank,* 31 Conn., 106.

And there is authority of equal respectability holding to the contrary. But we are here concerned only with the views which the Supreme Court of California has taken on this question. For this is a question, we repeat, whether, under her revenue system, the assessment of all corporate property is equivalent to the assessment of the shares of the corporation. And in passing upon that question the Supreme Court of that State has held, in so many terms, that such equivalency exists—that it exists to such an extent as to leave an assessment of both the corporate property and the shares open to the objection that the same property is thereby taxed twice.

Burke vs. *Badlam,* 57 Cal., 601.
San Francisco vs. *Anderson,* 103 Cal., 70-71.

Germania Trust Co. vs. *San Francisco,* 128 Cal., 595.
People vs. *National Bank*, 123 Cal., 53-60.
S. V. W. W. vs. *Schottler,* 62 Cal., 69.
San Francisco vs. *Fry*, 63 Cal., 470.

It is not necessary here to restate the holding of those cases. They are without conflict upon the principle that the assessment of the corporate property and also the stock of the corporation would be the taxation of the same property twice, since the taxation of the corporate property is the equivalent, in fact and in law, of the taxation of the stock. Judge Sawyer, in *San Francisco* vs. *Mackay,* 21 Fed., 539-40; 10 Saw., 302, stated the conclusion thus:

"The Supreme Court of the State, in *Burke* vs. *Badlam*, "57 Cal., 594, held that the Constitution of the State does "not authorize or require, but, on the contrary, forbids, a "double taxation of property; that it would be double tax- "ation to tax all the property of a corporation to the cor- "poration, and then assess to each stockholder the shares "of stock in it held by him. This decision by the State Su- "preme Court, giving a construction to the State Consti- "tution, is controlling in this Court. The corporation is "the immediate primary owner of all the property of the "corporation, the right of the stockholders in it being only "derivative and secondary. The Constitution and laws re- "quire all property to be assessed and taxed to the owner, "and the legal presumption is, as held in the case cited, "nothing to the contrary appearing, that all property of a

" corporation has been assessed to the corporation. * * *
" That being so, the assessment of the stock in question to
" defendant is, as to the amount assessed, a second or dou-
" ble assessment of the same property, and, as such, void."

Nor do we believe that the case of *Miller* vs. *Heilbron,* 58 Cal., 133, can be successfully relied upon as overruling the authority of *Burke* vs. *Badlam, supra.* As the Supreme Court of California has said, in *McHenry* vs. *Downer,* 116 Cal., 28 the case of *Miller* vs. *Heilbron,* although decided a month or two after the decision in *Burke* vs. *Badlam,* arose on a state of facts and under a statute in existence prior to those considered in *Burke* vs. *Badlam.* In fact, the Act, in the interpretation of which *Miller* vs. *Heilbron* was rendered, was repealed at the same time the Act considered in *Burke* vs. *Badlam* was enacted (Stats. 1881, p. 56.)

Miller vs. *Heilbron is not, therefore, on this point, an interpretation of any statute now in existence in this State, or under the authority of which either competing moneyed capital or national bank stock is being assessed.* It is the attempted interpretation of a statute which was repealed twenty years ago. *Burke* vs. *Badlam,* on the contrary, is the interpretation of a statute which was then, has ever since been, and is now, a substantive law of this State.

Miller vs. *Heilbron* throws no light on any existing law of this State, and cannot be said to be in conflict with *Burke* vs. *Badlam,* which contains an exposition of existing and different laws.

In addition thereto, *Burke* vs. *Badlam* is the expressed

views of Justices Ross, Sharpstein, McKee, Thornton, McKinistry, and Myrick, with Morrison, C. J., concurring on a different point, while *Miller* vs. *Heilbron*, if in point at all upon this question, is the views only of McKinstry, Thornton and Sharpstein. The views of these Justices in Banc are not controlling, and the judgment must have failed of affirmance had not Justice Ross concurred therein upon another point mentioned in the opinion of Justice McKinstry. Mr. Justice Ross did not concur in the views expressed by Justice McKinstry so far as there was any possible conflict between those views and those expressed in *Burke* vs. *Badlam*.

The rule announced in *Burke* vs. *Badlam* must, therefore, be considered the rule of assessment in this State, of the property and shares of stock of California corporations.

It follows that there is an equivalency, under our revenue system, between the assessment of the corporate property and the assessment of the stock; that the taxation of the corporate property is the taxation of the stock, and that the taxation of both the corporate property and the stock would be the taxation of the same property twice, and double taxation.

The taxation of all the corporate property being equivalent—the same as—the taxation of all the shares of stock, no stock of California corporations escapes taxation. The contention that there is a discrimination against national banks because the shares of stock of State banks is not

taxed is, therefore, based upon a falsehood in law and in fact.

It is the holding in the *Owensboro* case that the taxation of the property of a national bank, including its franchise, is not the same as the taxation of the shares of stock of such banks. It is the holding that the Act of Congress allows the latter and forbids the former. It is the holding that the law of Kentucky, assuming to place a tax upon the property of the bank, and not upon its shares, is void for that reason. But it was not held therein, nor could it have been, that the taxation of all the property of a State bank may not be the same as the taxation of the stock of such bank.

In the language of Mr. Justice Miller, speaking for the Court in *Davenport Bank* vs. *Davenport,* 123 U. S., 85:

"It has never been held by this Court that the States "should abandon systems of taxation of their own banks, "or of money in the hands of other corporations, which "they may think the most wise and efficient modes of tax- "ing their own corporate organizations, in order to make "that taxation conform to the system of taxing the nation- "al banks upon these shares of their stock in the hands of "their owners. All that has ever been held to be necessary "is, that the system of State taxation of its own citizens, "of its own banks, and of its own corporations, shall not "work a discrimination unfavorable to the holders of the "shares of the national banks. Nor does the Act of Con- "gress require anything more than this; neither its lan- "guage nor its purpose can be construed to go any farther.

" Within these limits, the manner of assessing and collect-
" ing all taxes by the States is uncontrolled by Act of Con-
" gress."

Davenport Bank vs. *Davenport,* 123 U. S., 85, is a case in which the contention was advanced that a valid assessment of national bank stock is possible only when a similar assessment is made of State bank stock. Justice Miller states the contention thus:

" The proposition of counsel seems to be, that the capital
" of savings banks can be taxed by the State in no other
" way than by an assessment upon the shares of that capi-
" tal held by individuals, because, under the Act, the capi-
" tal of the national banks can only be taxed in that way.
" It is strongly urged that in no other mode than by taxing
" the stockholders of each and all the banks can a perfect
" equality of taxation be obtained."

And it is held that the State is not required to abandon its own system of taxing the capital of corporations instead of their stock in order to effect taxation or national bank stock.

This case was in line with *Mercantile Bank* vs. *New York*, 121 U. S., 138-60, wherein it was held that a tax levied upon the capital and franchise of State trust companies and savings banks will satisfy the requirements of the Act of Congress, notwithstanding the stock of such corporations is not directly taxed.

See, also:

Palmer vs. *McMahon*, 133 U. S., 660.
Bank of Redemption vs. *Boston*, 125 U. S., 60.

These cases are cited and approved by Mr. Justice White, in *Owensboro National Bank* vs. *Owensboro*. They are cited for the purpose of pointing the distinction between that class of cases in which it is held *that the power conferred by Congress does not admit of the taxation of corporate property of national banks directly,* and that class of cases which hold that *there is no discrimination against national bank stock when the corporate property of State banks is taxed instead of the shares of stock of such banks.*

When, therefore, it is established, as it is in this State, that all the corporate property of State corporations is taxed, and that, under this tax system, the taxation of such property is the equivalent of the taxation of all the property of such corporations, it necessarily follows that there is no discrimination against national bank shares under a law which places the tax upon such shares.

Equivalency in Fact.

That there is an equivalency in fact, as well as in law, is demonstrated by the following statement. Through this statement a comparison is presented by the hypothetic assessment of the assets of the Nevada National Bank as a State bank. The figures are taken from the agreed facts.

ASSETS.

1.	Call Loans	$4,678,532 76	
2.	Bills Discounted	120,131 78	
3.	Bills Receivable	133,700 00	
			$4,932,464 54
4.	Treasurer U. S. 5% Redemption Fund		29,700 00
5.	Due from Banks and Bankers		562,173 96
	Collections	185,880 26	
	Sterling Acceptance Debtors	196,126 61	
	Debtors to Foreign Credits	488,196 23	
			870,203 10
7.	United States Bonds	2,335,284 05	
7½.	Miscellaneous Bonds	963,099 88	
			3,298,383 93
8.	Safe and Fixtures	3,450 00	
	Taxes	582 96	
	Expenses	16,240 85	
			20,273 81
9.	Cash on hand		2,276,917 81
			$11,990,117 15

LIABILITIES.

10.	Capital	$3,000,000 00		
11.	Reserve	600,000 00		
12.	Profit & Loss	324,298 74		
			3,924,298	74
	Circulating Notes		249,590	00
13.	Current Accounts	3,518,056 35		
14.	Certificates of Deposit	563,807 68		
15.	Certified Checks	398,417 77		
16.	Cashier's checks outstanding	15,000 00		
17.	Due to Banks and Bankers	2,342,211 67		
			6,837,493	47
	Bills received for collection	185,880 26		
	Sterling Acceptance Creditors	196,126 61		
	Commercial Credits	331,231 23		
	Travelers' Credits	156,965 00		
			870,203	10
	Interest	61,048 26		
	Commission	7,551 46		
	Inland Exchange	4,520 24		
	Foreign Exchange	17,763 71		
			90,883	67
	Dividend Account		2,782	50
	Assets Suspense Account.		14,865	67
			$11,990,117	15

State of California,
City and County of San Francisco—ss.

I, George Grant, cashier of the Nevada National Bank of San Francisco, do solemnly swear that the above statement is true to the best of my knowledge and belief.

(Notary's acknowledgment.)

(Signed) GEORGE GRANT, Cashier.

18. Varions Bonds.....$623,516 55
19. California quasi public Corporations 339,583 33

———— $963,099 88

(Signed) GEORGE GRANT, Cashier.

SUMMARY NEVADA NATIONAL BANK.

As a State bank—From items Nos. 1, 2, 3, 4, 5, 18, aggregating $6,147,852, may be deducted items Nos. 13, 14, 15, 16 and 17 (if due bona fide residents of Cal.), aggregating $6,837,491, leaving no balance as assessable for solvent credits. Item No. 8 would be assessed as furniture, ($3,450) or more; item No. 9 as money $2,276,917); total assessment for tangible property $2,300,367, to which add a franchise value of $574,766, making a total assessed value of $2,875,133—$95.83 a share. Franchise value is arrived at by multiplying 30,000 shares by $185—market quotation—making $5,550,000, less value of exempt property—items 7 and 7½ and 18, aggregating $2,674,867—leaving a

net assessable market value of $2,875,133—from which assessed value of the tangible property ($2,300,367) is deducted, leaving assessment of franchise $574,766.

As a National bank—Market value of stock $185 a share, by 30,000 shares—$5,550,000, less non-taxable property—item 7, 7½ and 19—aggregating $2,674,867, leaving $2,875,133 as total assessable value of all the shares (30,000 shares), or $95.83 assessable value of each share.

State Bank assessment.....$2,875,133
National Bank assessment..... 2,875,133
National Bank actually assessed at..... 2,445,000
i. e., $81.50 per share.

II.

Deductions of "Property Exempt by Law."

It was considered possible to assess the stock of national banks without an enabling Act, on the theory that the property of such institutions, other than real estate, was not taxable. The attempt was made in *McHenry* vs. *Downer*, 116 Cal., 20, and the Supreme Court of the State held that, in the absence of legislation designed to accomplish the assessment of national bank stock, no such assessment could be made. It held further that there was a discrimination against national bank stock, in an assessment of that stock when the corporate property of State corporations was assessed, and not the stock. In short, under the laws of the State, as they then existed, there was not an equivalency between the assessment of the stock of

national banks and the assessment of the corporate property of State corporations. It was not questioned by the Court, however, but that such equivalency could be made to exist. It was held that a discrimination was possible against national banks, because in the estimation of the value of its shares no deduction was allowed on account of U. S. bonds and other non-taxable securities, which were not assessed when owned by State corporations.

The point may be illustrated thus: The Bank of California owns $1,000,000 worth of U. S. bonds and bonds of *quasi* public corporations, which are not taxable. Its entire corporate property, including such bonds and excluding its franchise, is valued at $5,000,000. The market value of its stock aggregates $6,000,000. Its franchise is valued, therefore at $1,000,000. It will be assessed therefore for $1,000,000 on its franchise and $5,000,000 tangible property, less the non-assessable bonds, worth $1,000,000. Its entire assessment, therefore, will be $5,000,000.

Now, in the case of a national bank owning similar property, under the law as it existed when *McHenry* vs. *Downer*, *supra*, was decided, no deduction from the value of its property, which would be used in estimating the value of its shares, would be allowed on account of U. S. bonds. As had been decided in *Van Allen* v. *Assessors*, 3 Wall., 573, and kindred cases, such bonds should be included in the valuation of such stock. This was the result: The stockholders of a national bank holding $1,000,000 in U. S. bonds, the stock of which had an aggregate market

value of $6,000,000, would be assessed for $6,000,000, less the value of the bank's real estate only. Here, then, there would be a discrimination against such stockholders in the assessment of the U. S. bonds held by the bank and the exemption of such bonds, when held by a State bank.

In the adoption of the Act of March 14, 1899, however, the Legislature has made provisions whereby this discrimination is removed, by allowing the same exemptions to the national banks as have been enjoyed by State banks. It is therein provided:

"In making such assessment to each stockholder, there "shall be deducted from the value of his shares of stock "such sum as in the same proportion to such value as the "total value of its real estate and property exempt by law "from taxation bears to the whole value of all the shares "of capital stock in said national bank."

The Assessor is authorized and required, therefore, to deduct from the value of the share of stock, such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares. This the Assessor has done in this case. The method pursued will be found set forth in appellant's bill. It appears therefrom that the Assessor permitted a deduction on account of U. S. bonds, deposited to secure circulation, on account of U. S. bonds on hand, and on account of stocks and bonds of California corporations exempt under *Germania Trust*

Co. vs. *S. F.*, 128 Cal., 589. The total deduction made was divided by 30,000, the number of shares issued by appellant. This sum was deducted from the market value of appellant's stock, and the balance was assessed as the value of each share.

Those properties, therefore, which are treated as exempt in the assessment of the properties of State banks, are also treated as exempt in an estimation of the value of the shares of national banks. Absolute equality is maintained thereby, and any possible discrimination on account of such exemptions is avoided.

Solicitor for appellant seeks to give this provision in the Act of 1899 such an interpretation as would entirely nullify and defeat its purpose. The deduction allowed on account of "property exempt by law," he would have the Court so interpret as to require a deduction of all the properties of the national bank, thereby leaving no value in the share to be assessed. Such a construction would lead to a manifest absurdity. Such a construction would create a contradiction in terms, requiring the assessment of the stock, and providing a means for ascertaining its value, which would relieve it entirely from such assessment. No such intent can be attributed to any Legislature in the presence of any possible construction which will give effect to the language used. Where a statute is fairly susceptible of two constructions—one leading inevitably to mischief or absurdity, and the other consistent with justice, sound

sense and wise policy—the former should be rejected and the latter adopted.

In re Mitchell, 120 Cal., 384-86.
Jacobs vs. *Supervisors*, 100 Cal., 127.
Sedgwick on Stat. and Const. Law, 312.

When, therefore, it becomes manifest, from a review of the revenue laws of California, as construed by her Courts, that the deductions to be allowed, under this section of the Act, were to be so allowed for the purpose of avoiding a possible discrimination against national banks, it is fair to consider the exemptions permitted State banks in order to determine what exemptions are intended to be allowed national bank stockholders. When the purpose and intent of the Act is kept in mind, no difficulty is experienced in giving to this provision a rational and correct interpretation.

Nor is appellant's solicitor correct in the assumption that all the property of national banks is exempt from taxation, except their real estate. It is undoubtedly true that direct taxation of the property of a national bank, other than its real estate, is not permissible. But it does not follow that such property cannot be taxed for that reason. On the contrary, Congress has seen fit to permit the taxation of such property through the medium of the shares. In the valuation of the shares each and every element of property possessed by the national bank is to be considered, including United States bonds. The property of such banks is not exempt by law, therefore, from taxation. The Act of

1899 has manifest reference to such property as is exempt when held by State banks, and such property may include United States bonds and stocks and bonds of California corporations. By the deduction of such property from the property assessed to State banks, and from the value of the shares of national banks, absolute equality is created in the taxation of both.

It is thus evident both by the statutes and decisions of this State, that the system of taxation on its face works no discrimination against the national bank shareholders, and that it was the thought and intent of the State Legislature that the taxation of the property and the taxation of the shares was one and the same.

The purpose of this method of taxation was to avoid what the Supreme Court of the State had declared to be double taxation. And in the case of *Hepburn* vs. *School Directors*, 23 Wall., 480, it is held that the exemption of all morgages, judgments, recognizances, and monies owing upon articles of agreement for sale of real estate from taxation to prevent a double burden, by the taxation both of the property and the secured debt, was a justifiable exemption and did not discriminate against shareholders of national bank stock.

III.

Due Process of Law.

Counsel for appellant advances the contention that the Act of March 14, 1899, has the effect of depriving the stock-

holders of the Nevada National Bank of their property without due process of law. Fortunately this subject, in its relation to the assessment and taxation of property, has been so often and so thoroughly considered by the Supreme Court of the United States, and the Courts of the different States, as to leave but little room for controversy.

The necessity for notice, either actual or constructive, with an opportunity to be heard, may be considered essential to the validity of a tax, where the tax is to be levied upon an assessment, based upon a valuation of the taxpayer's property, fixed by the Assessor. But it is equally true that the opportunity to be heard, and such notice, may be given after, as well as before, the assessment. And where, as in this State, provision is made for a board of revision or equalization, the time for the sitting of which is fixed by law, it is held that a sufficient opportunity for a hearing is afforded to answer the requirements of due process of law (Sec. 3672, *et seq.*, Pol. Code).

"The officers in estimating the value act judicially; and "in most States provision is made for correction of errors "committed by them, through boards of revision or equal- "ization, sitting at designated periods provided by law to "hear complaints regarding the justice of the assessments. "*The law, in prescribing the time when such complaints* "*will be heard, gives all the notice required, and the pro-* "*ceeding by which the valuation is determined,* though it

" may be followed, if the tax be not paid, by a sale of the " delinquent's property, *is due process of law.*"

Hagar vs. *Reclamation District,* 111 U. S., 701-10.

"It is enough, however, if the law provides for a board of " revision authorized to hear complaints respecting the jus- " tice of the assessment, and prescribes the time during " which, and the place where, such complaints may be made " (*Hagar* vs. *District,* 111 U. S., 701-710)."

Palmer vs. *McMahon,* 133 U. S., 660-69.

And as Justice Miller said, in *State Railroad Tax Cases,* 92 U. S., 575-610:

"This board has its time of sitting fixed by law. Its ses- " sions are not secret. No obstruction exists to the appear- " ance of any one before it to assert a right or redress a " wrong; and in the business of assessing taxes, this is all " that can be reasonably asked."

Kentucky R. R. Tax Cases, 115 U. S., 330-2-3.

And as the Supreme Court of Missouri says, in *State ex rel.* vs. *Springer,* 134 Mo., 225-6:

"Nor is it essential to 'due process' that an opportunity " for a hearing should precede the order of assessment or " increase of assessment (*Black* vs. *McGonigle* (1891), 103 " Mo., 192). A hearing allowed after, as well as before the

"formal order, will meet the demands of constitutional "right, if the Legislature ordains that procedure * * * "a statutory appointment of a date to make objections to "antecedent steps (in the matter of assessments for taxa- "tion) affords a sufficient opportunity for a hearing there- "on to answer the requirements of due process of law."

Land Co. vs. *Minnesota,* 159 U. S., 626-37.
Lent vs. *Tillson,* 140 U. S., 324.

It is the provision of the California Constitution, Section 9, Article XIII, that:

"The Boards of Supervisors of the several counties of the "State shall constitute boards of equalization for their re- "spective counties, whose duty it shall be to equalize the "valuation of the taxable property in the county for pur- "poses of taxation; provided, such State and county "boards of equalization are hereby authorized and empow- "ered, under such rules of notice as the county boards may "prescribe as to county assessments, and under such rules "of notice as the State board may prescribe as to action of "the State board, to increase or lower the entire assess- "ment roll, or any assessment contained therein, so as to "equalize the assessment of the property contained in said "assessment roll, and make the assessment conform to the "true value in money of the property contained in said "roll."

And Section 3672 of the Political Code fixes the time at

which such county boards of equalization shall meet as follows:

"The Board of Supervisors of each county must meet on " the first Monday of July in each year to examine the as- " sessment book and equalize the assessment of property in " the county. It must continue in session for that purpose, " from time to time, until the business of equalization is " disposed of, but not later than the third Monday in July."

These provisions of the law afford the taxpayer a full opportunity to appear and present his views regarding the assessment, and, under the authorities, satisfy the requirements of due process of law.

Cooley on Taxation, pp. 364-5.
State vs. *Runyan,* 41 N. J. L., 98.
Hagar vs. *Reclamation District,* 111 U. S., 701-10.
Palmer vs. *McMahon,* 133 U. S., 660-669.
State Railroad Tax Cases, 92 U. S., 575-610.
Kentucky Railroad Tax Cases, 115 U. S., 330-2-3.
Lent vs. *Tillson,* 140 U. S., 324.
State vs. *Springer,* 134 Mo., 225-6.
Land Co. vs. *Minnesota,* 159 U. S., 626-637.

In addition to this, provision is found in Constitution and statute for the presentation, by the taxpayer, to the Assessor, of a statement of his taxable property. Section 8, Article XIII, of the California Constitution, provides;

"The Legislature shall by law require each taxpayer in

" this State to make and deliver to the County Assessor an-
" nually a statement, under oath, setting forth specifically
" all the real and personal property owned by such tax-
" payer, or in his possession, or under his control, at twelve
" o'clock meridian of the first Monday of March."

And the Legislature has complied with this mandate in the enactment of Section 3629 of the Political Code.

So, under the California system, as interpreted by the Supreme Court of that State in *Henne* vs. *Los Angeles County,* 129 Cal., 297-9:

"For an overvaluation of the assessment of property be-
" longing to a taxpayer a remedy is furnished him by stat-
" ute, as already shown, first by application to the Assessor
" at any time before it passes out of his hand to the Board
" of Supervisors, and thereafter to the Board of Super-
" visors, until the assessments have been equalized and the
" matter has gone beyond their control."

And this right to a hearing before the Assessor in the first instance, and before the local Board of Equalization, later, is as fully secured to a taxpayer who pays unsecured personal property taxes as to one whose taxes upon personal property are secured by real property.

As the Supreme Court of California has held, in *Rode* vs. *Siebe,* 119 Cal., 521:

"As to the right of equalization, that is not taken away
" by a previous collection of the tax; and if the assessment

" is reduced by either board of equalization the excess over " the true amount of the tax is refunded."

We believe it will be plain upon a reading of the two or three authorities cited by counsel for complainant, in the light of the statutes under which those cases were decided, that they are not in point upon the question now under review, and that they do not conflict with that great number of cases, some of which are cited above, in which the rule is stated that an opportunity to appear, either before the Assessor or a board of equalization, satisfies the requirements of due process of law.

Of course, the Act of March 14, 1899, could not have denied such opportunity, since it is guaranteed to all taxpayers by Section 9, Article XIII, of the State Constitution.

" The Legislature has no power thus to deprive a citizen " of an opportunity of appearing before the board (of equal- " ization) for the purpose of contesting the amount as- " sessed against him."

People vs. *Railroad Co.*, 67 Cal., 625.

If given the construction contended for by complainant, it would be brought in contact with this provision of the Constitution and would thereby be destroyed. But its evident import is to avoid the necessity for further *personal* notice, and in this construction it is a constitutional exercise of power. As Judge Cooley says, in his work on Taxation, pages 364-5:

"It is not customary to provide that the taxpayer shall "be heard before the assessment is made, except where a "list is called for from him; but a hearing is given after- "wards either before the Assessors themselves, or before "some Court or board of review. And of the meeting of "that board or Court the taxpayer must in some manner "be informed, either by personal notice, or by some general "notice which is reasonably certain to reach him, or— "which is equivalent—by some general law which fixes the "time and place of meeting, and of which he must take no- "tice. The last is a common method of bringing the as- "sessment to the notice of the taxpayer, and it is, perhaps, "the best of all, because it comes to be generally under- "stood and is remembered."

Personal notice in the case at bar may be considered impossible, in view of the non-residence of the stockholders of complainant. It would be so generally in any case, considering the brief time in which the assessment must be made and the vast number of individual taxpayers. So it has been held:

"Constructive notice, such as is above provided for, is, "in fact, at the present time, the only notice a non-resident "receives of the assessment of taxes on lands, or on chat- "tels, which are taxable in the township in which they are "located. * * * If the prosecution's view of the neces- "sity of notice other than constructive notice, such as is "above referred to, be correct, no legal assessment of taxes

"can be made in this State against the owner of real or "personal property who happens to be a non-resident of "the township in which the same is located. The counsel's "contention on this ground is without foundation."

Lent vs. *Tillson*, 140 U. S., 324.

The language of the California statute, in this particular, is taken *verbatim* from Section 312 of an Act of the Legislature of the State of New York, passed July 1, 1882, the validity of which is affirmed in *Mercantile Bank* vs. *New York*, 121 U. S., 138. The section is set forth on pages 139-140 of that report.

In conclusion, it may be said that the determination in favor of the validity of the tax was reached by the Court below only after several days of oral argument, and a final submission upon printed briefs, of which the briefs filed here are copies. The matter there received the serious consideration to which it is entitled, and the learned Judge of the Circuit Court reached the conclusion indicated only after the most mature deliberation. We respectfully submit, the decision rendered was correct and the judgment should be affirmed.

FRANKLIN K. LANE,
City Attorney,
Solicitor for Appellees.

W. I. BROBECK,
Assistant City Attorney,
Also for Appellees.